

DEMOCRATIC REPUBLIC OF CONGO

The Long-Awaited New Petroleum Law

Introduction

After the independence of the Democratic Republic of Congo (the DRC) in 1960, mining and petroleum activities were governed by the same law. In 2002, a Mining Code was approved, but petroleum activities were left under a 1981 law, which had also been drafted for minerals and hydrocarbons and was somewhat outdated. Now, more than 30 years after its independence, the DRC has its first Hydrocarbons Law, which entered into force on August 1, 2015 (the Law), a development certainly welcomed by the industry.

Under the Law, the State participates in upstream and downstream hydrocarbon activities through its national oil company (NOC). The NOC may engage in these activities directly or indirectly, in association with other Congolese or foreign companies. Any association must be made through a joint venture agreement without creation of a separate legal entity, and the NOC is entitled to a minimum non-assignable participation of 20%. CoHydro (*Congolaises des Hydrocarbures*), which was created in 1999, has a corporate purpose board enough to encompass exploration and production. Therefore, although this state company has only been engaged in downstream activities, we expect to see her entering the upstream business.

Upstream Activities

Subject to the filing of an environmental impact study and the underwriting of tender specifications set forth by the Minister of Hydrocarbons, prospection authorizations are granted for periods of 12 months, renewable once for six months. They are not assignable and all data acquired during the works carried out under a prospection authorization belongs to the State.

Exploration and exploitation rights are granted pursuant to a public tender open by a call for bids published by the Minister of Hydrocarbons with the technical and financial criteria approved by the Council of Ministers. Those rights are awarded to the NOC in association with one or more Congolese or foreign legal entities, all forming the "Contractor." Exploration costs and risks are fully borne by the companies associated with the NOC. In case there is a commercial discovery, the NOC will merely have to reimburse development costs and these are reimbursed from up to 50% of the NOC profit oil portion per year.

Also, the Law provides that all foreign legal persons must incorporate a company in DRC to carry out exploration and exploitation activities in the country. Therefore, although the NOC may conclude petroleum

contracts with national and foreign entities, at least the Operator will surely be required to incorporate locally.

The Law provides for the award of production sharing contracts (PSCs) or services agreements. These contracts and any amendments thereto are executed by the Minister of Hydrocarbons and the Minister of Finance, following a deliberation from the Council of Ministers, and enter into force after the President's approval by ordinance. According to the Law, they shall be published in the Official Gazette and in an official website of the Ministry of Hydrocarbons, which gives the new regime greater transparency. With the same goal, the Law also provides for the disclosure and publication in a Ministry's website and the Official Gazette of production, payments and revenue figures certified by oil and gas companies.

Exploration rights are granted on an exclusive basis generally for an initial period of three years and are renewable twice for three-year periods, by a decision issued by the Minister of Hydrocarbons after consulting with the Council of Ministers. In the case of sedimentary basins with difficult geological conditions or access, exploration rights have an initial period of four years. The exploration period may also be extended for a maximum six months to allow the Contractor to complete drilling or evaluation works. On the date of each renewal, a 50% of the area then retained must be relinquished.

Exploitation rights are granted on an exclusive basis for a maximum period of 20 years, renewable once for a 10-year maximum. The Contractor must start development operations by no later than 12 months following the approval of the development and production plan.

Gas flaring is prohibited and may only be allowed on an exceptional basis under the terms of the Law and subsequent regulations. The Contractor must evaluate associated gas reserves and resources and simulate the production of gas discovered or produced during exploration or exploitation activities, pursuant to a gas development, production and use plan filed with the Ministry of Hydrocarbons. The production of liquid hydrocarbons from associated natural gas (e.g. condensates and liquefied petroleum gas) and from specific non-associated natural gas deposits requires an amendment to the relevant hydrocarbons contract.

Associated natural gas may be used for self-consumption connected to oil operations, reinjection to improve recovery of liquid hydrocarbons,

national consumption or exportation. If the associated natural gas is not used for any of these purposes, it may be used by the State and no indemnity will be due to the contracting party. The State may enter into specific agreements for the development of projects for use of available associated natural gas.

Any and all assignments of exploration or exploitation rights (whether total or partial, direct or indirect) must be approved by the Minister of Hydrocarbons, upon notice to the Council of Ministers. The approval of any assignment is subject to compliance by the assignor with the ongoing minimum work program and its associated budget, and depends on the technical and financial capacity of the assignee. If the assignee is an affiliate of the assignor, the assignor must guarantee the compliance of the assignee's obligations.

It should be noted that the NOC has a preemption right to any assignment, although the Law does not specify how such right is to be exercised in practice. Also, assignments to affiliates are not expressly exempt from this right.

Upon conclusion of exploration and/or exploitation works and each time that part of a block is relinquished, the Contractor must, at its own expense, reclaim the site and carry out abandonment operations in accordance with the Law and subsequent regulations. During the exploitation period, upon production of the first oil barrel, the Contractor must constitute an abandonment provision by means of regular transfers to an escrow bank account opened with the Central Bank of Congo.

The principles applicable to exploration and exploitation of liquid hydrocarbons are applicable to non-associated natural gas.

If non-associated natural gas is discovered, the Contractor must (i) notify the Minister of Hydrocarbons within seven days, and (ii) whenever the discovery is potentially commercial, carry out demarcation and appraisal works. If there actually is a commercial discovery, the hydrocarbons contract shall be amended and a development and production plan shall be filed.

Finally, the Law also regulates non-conventional hydrocarbons (e.g. bitumen, oil shale, tar sands, coal bed methane and shale gas). In this respect the most relevant provisions worth noting are: (i) the exploration period has a maximum period of 10 years and the exploitation period a maximum period of 35 years (including renewals) and (ii) the hydrocarbons contract must set forth the type of technique for exploration and exploitation of the non-conventional hydrocarbons.

Downstream Activities

The following are downstream activities under the Law: (i) refining; (ii) petroleum products transportation and storage; (iii) petroleum products supply; (iii) petroleum products importation and marketing; and (v) petrochemical industry.

Although the petroleum products supply chain is subject to the free competition principle, each downstream activity requires a specific authorization. Moreover, other specific regulations are also applicable to downstream activities (e.g. person and goods safety; installation,

quality and control of facilities and equipment; environment protection; and stocks control).


Downstream companies are subject to a number of duties, including but not limited to, (i) ensuring compliance of their facilities with the requirements set forth in the Law's subsequent regulations; (ii) acquiring the exploitation means required to tackle demand and develop appropriate means to meet national demand increase; (iii) subscribe insurance policies in accordance with applicable legislation; (iv) contributing to the training of national employees; and (v) clean-up operations at the end of the exploitation period.

Although downstream activities must be further regulated, there are a number of specific provisions provided for in the Law in this respect, including (i) loading, removal, transport and unloading of petroleum products from one location to another, as well as storage, are subject to prior authorization; (ii) pipeline transportation and storage of petroleum products are subject to the third party access principle; (iii) distribution of butane gas and liquefied petroleum gas are subject to prior authorization; (iv) holders of refining and transformation authorizations are required to be supplied primarily in the national territory provided that equal prices and similar quality are offered; and (v) only holders of authorizations to import or distribute petroleum products may be supplied by refineries to sell in the national market.

Through the NOC, the State is required to create and keep minimum (security) stocks of all types of petroleum products equivalent to 60 days of consumption. Companies carrying out importation or marketing activities are also required to keep petroleum products stocks of all types representing 20% of the consumption volumes declared in the preceding year. Such percentage may however be increased by Decree to up to 50%.

Final Notes

Except for provisions on environment, health and safety, which are applicable immediately, hydrocarbon rights acquired before the Law was enacted shall remain in force until they expire. From their renewal date, these rights shall be subject to the Law.

The Law is broadly drafted and refers various crucial topics and issues (e.g. local content, bid and selection procedures, production sharing and cost recovery terms, abandonment plan and fund regime and transportation and storage activities) to subsequent regulation. Accordingly, there is uncertainty with respect to important aspects that are yet to be regulated within the oil and gas sector in the DRC. However, under the Law, these regulations shall be approved by the Council of Ministers within six months from its enactment. 

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